

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
By: SAMUEL DOLINGER
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel.: (212) 637-2677
E-mail: samuel.dolinger@usdoj.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-v-

HEINZ GENTGES,

Defendant.

18 Civ. 7910 (KMK)

RULE 56.1 STATEMENT

Plaintiff the United States of America (the “United States”), by its attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York, respectfully submits this statement pursuant to Local Civil Rule 56.1 of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York to set forth material facts as to which it contends there is no genuine issue to be tried in connection with its motion for summary judgment.

1. Defendant Heinz Gentges was a U.S. citizen in 2007. Declaration of Samuel Dolinger (“Dolinger Decl.”) Ex. L (“Compl.”) ¶¶ 11-12; Dolinger Decl. Ex. M (“Answer”) ¶¶ 11-12; *see* Dolinger Decl. Ex. D (“Gentges Depo.”) 14:10-15:10; Dolinger Decl. Ex. F (“Gentges Aff.”) ¶¶ 1, 9.

2. In 2007, Gentges had financial interests in two foreign financial accounts at UBS AG (“UBS”) in Switzerland, bearing numbers XXX-XXXX4959¹ (the “4959 Account”) and XXXX-XX4337 (the “4337 Account”). Compl. ¶¶ 13-14, 25-26; Answer ¶¶ 13-14, 25-26; Gentges Depo. 126:1-19; Gentges Aff. ¶ 9;

3. The balance of both UBS accounts during 2007 was greater than \$10,000. Compl. ¶¶ 18, 27; Answer ¶¶ 18, 27; Dolinger Decl. Ex. B (“UBS 4959 Records”) at USA18; Dolinger Decl. Ex. C (“UBS 4337 Records”) at D2267.²

4. Gentges failed to file a timely Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts, also known as an “FBAR,” to report his interest in the UBS accounts in 2007. Compl. ¶¶ 23, 30; Answer ¶¶ 23, 30.

5. In November 2001, Gentges signed documents to open the 4959 Account. UBS 4959 Records at USA70-71.

6. The 4959 Account was opened as a numbered account rather than a “name account.” *Id.* at USA70.

7. Gentges identified himself as the beneficial owner of the 4959 Account and listed his address in Hawthorne, New York. *Id.* at USA69-70.

8. With respect to the 4959 Account, Gentges instructed UBS not to invest in U.S. securities, and signed an instruction to UBS stating, “I would like to avoid disclosure of my identity to the US Internal Revenue Service under the new tax regulations. To this end, I declare that I expressly agree that my account shall be frozen for all new investments in US securities as from 1 November 2000.” *Id.* at USA50.

¹ Pursuant to Fed. R. Civ. P. 5.2(a)(4), all but the last four digits of financial account numbers herein are redacted.

² For ease of reference, leading zeroes in Bates numbers have been omitted.

9. Gentges's instruction regarding the 4959 Account acknowledged that he was "liable to tax in the USA as a US person." *Id.*; *see* Gentges Depo. 149:23-153:1.

10. Gentges instructed UBS to retain his mail related to the 4959 Account at the bank, for a fee, rather than having it mailed to his address in New York. UBS 4959 Records at USA70.

11. Subsequently, when Gentges would visit the bank in Switzerland, including during three visits in 2007, he retrieved his mail related to the 4959 Account and then authorized UBS to destroy the mail that he did not take with him. *See id.* at USA124, 129, 136-37, 141, 144, 152, 159, 163.

12. Gentges also communicated with UBS bank personnel regularly to discuss the account and his investments, through in-person visits, telephone conversations, e-mails, and letters. *See id.* at USA40-48.

13. UBS frequently corresponded with Gentges using an address in Switzerland. *See id.* at USA41, 44-47.

14. According to UBS records, the balance of the 4959 Account in June 2008—the deadline for filing the 2007 FBAR—was \$1,358,730.01. UBS 4959 Records at USA18.

15. In February 2002, Gentges signed documents to open the 4337 Account, which was opened as a numbered account rather than a "name account." UBS 4337 Records at D2154-55.

16. Gentges identified himself as the beneficial owner of the 4337 Account and listed his address in Hawthorne, New York. *Id.* at D2154, 2168.

17. In documents regarding the 4337 Account, Gentges stated that he was "liable to tax in the USA as a US person," and agreed that the account would be "frozen for all new investments in US securities." *Id.* at D2160.

18. Gentges instructed UBS to retain his mail related to the 4337 Account at the bank, for a fee, rather than having it mailed to his address in New York. *Id.* at D2154.

19. Gentges retrieved his mail regarding the 4337 Account at the bank in Switzerland on a number of occasions, including during three visits in 2007, and then authorized UBS to destroy the mail that he did not take with him. *See id.* at D2173, 2183-86, 2189-91.

20. The balance for the 4337 Account at the end of 2007 was \$448,975. *Id.* at D2267-68.

21. In 2003, Gentges and his wife formed trusts for estate planning purposes, into which they transferred the ownership of their home in New York and all of their U.S. accounts. Gentges Depo. 97:2-100:22; Dolinger Decl. Ex. H (Certificate of Trust).

22. Gentges did not transfer the UBS accounts into the trust. Gentges Depo. 100:24-101:25, 112:12-16.

23. Gentges did not disclose the existence of the UBS accounts to the attorney he retained to form the trusts. *Id.*

24. Gentges did not seek any advice about the UBS accounts from the trust attorney or anyone else. *Id.*

25. Gentges submitted a U.S. income tax return for tax year 2007. Dolinger Decl. Ex. G (Gentges 2007 Tax Return); Compl. ¶ 11; Answer ¶ 11; Gentges Depo. 89:23-95:5; Gentges Aff. ¶¶ 16.

26. Gentges had the opportunity to review this tax return after it was prepared by his tax preparer, Richard Surico. Gentges Depo. 109:21-110:19.

27. Gentges employed the same accountant, Richard Surico, to prepare his tax returns for decades leading up to tax year 2007. Gentges Depo. 55:22-56:6, 89:23-92:21; Dolinger Decl. Ex. E (“Surico Depo.”) 35:5-22.

28. Gentges never disclosed the existence of the UBS accounts to Surico. Gentges Depo. 76:11-25, 111:14-112:3; Surico Depo. 74:23-76:11.

29. Gentges never sought Surico’s advice about the income he received from the UBS accounts. Gentges Depo. 76:11-25.

30. Part III of Schedule B of Gentges’s individual income tax return asked him to state whether he had an interest in a foreign financial account in 2007. Gentges 2007 Tax Return at D1725.

31. Schedule B of Gentges’s 2007 tax return included the following:

Part III Foreign Accounts and Trusts	You must complete this part if you (a) had over \$1,500 of taxable interest or ordinary dividends; or (b) had a foreign account; or (c) received a distribution from, or were a grantor of, or a transferor to, a foreign trust.	Yes	No
7a	At any time during 2007, did you have an interest in or a signature or other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account? See page B-2 for exceptions and filing requirements for Form TD F 90-22.1		X
b	If "Yes," enter the name of the foreign country ►		
8	During 2007, did you receive a distribution from, or were you the grantor of, or transferor to, a foreign trust? If "Yes," you may have to file Form 3520. See page B-2		X

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Schedule B (Form 1040) 2007

Gentges 2007 Tax Return at D1725.

32. The instructions for Schedule B, Part III, of the 2007 tax return specifically state that a taxpayer “must complete this part if you . . . (b) had a foreign account.” *Id.*

33. The instructions for Schedule B require the taxpayer to select “Yes” in response to Question 7(a) if the filing taxpayer has an “interest in or a signature or other authority over a financial account in a foreign country.” *Id.*

34. If the “Yes” box is checked, Schedule B directs the taxpayer to filing requirements for Form TD F 90-22.1, the FBAR form. *Id.*

35. Gentges's 2007 return incorrectly responded "No" to Question 7(a), indicating that he had no foreign financial accounts during that year. *Id.*

36. Gentges admitted at his deposition that this answer was incorrect, because in fact he had foreign accounts at UBS in Switzerland in 2007. Gentges Depo. 93:16-95:5.

37. Gentges withdrew approximately \$140,000 worth of cash from the UBS accounts at issue between 2001 and 2007, in different currencies. *See* UBS 4959 Records at USA221, 226, 231, 244, 245, 248-50, 269, 275, 277, 312, 315, 318; UBS 4337 Records at D2210, 2212.

38. Between 2001 and 2007, Gentges withdrew \$116,560 from U.S. dollar-denominated sub-accounts of the UBS accounts at issue. *See id.*

39. UBS contact records confirm Gentges's withdrawals in U.S. dollars on a number of these dates in 2007. UBS 4959 Records at USA40-41, 46.

40. In 2008, Gentges withdrew approximately \$100,000 worth of cash from UBS, in different currencies, including \$83,033 from U.S. dollar-denominated sub-accounts. UBS 4959 Records at USA237, 238, 281, 283, 323.

41. UBS banking records and contact records confirm Gentges's withdrawals in U.S. dollars on several of these dates in 2008. *Id.* at USA47, 281; UBS 4337 Records at D2187.

42. Gentges was aware that U.S. regulations required him to declare the transportation of currency exceeding \$10,000 into the United States. Gentges Depo. 183:19-184:9.

43. In September 2008, UBS informed Gentges that he had to close his accounts at the bank by the end of the year. Gentges Depo. 199:22-200:8; UBS 4959 Records at USA47.

44. Gentges did not consider moving the funds into the United States after UBS informed him that he was required to close his accounts. Gentges Depo. 199:22-200:8, 206:7-15.

45. Between September and November 2008, Gentges closed the UBS accounts and transferred the funds from the accounts to Migros Bank, another financial institution based in Switzerland. Compl. ¶¶ 32-34; Answer ¶¶ 32-34; UBS 4959 Records at USA47-48, 53-59; UBS 4337 Records at D2161; Gentges Depo. 202:1-13, 203:24-205:11.

46. In November 2008, Gentges instructed that his retained UBS mail be sent to his son's address in Lyss, Switzerland. UBS 4959 Records at USA48, 60; Gentges Depo. 205:1-14.

47. Several years later, Migros Bank advised Gentges that he had to close his account there because that bank was "not doing business anymore with American citizen[s]." Gentges Depo. 218:9-16.

48. At that point, Gentges transferred the funds to Raiffeisen Bank, another Swiss bank, which he chose because it was one of the few remaining Swiss banks that would deal with U.S.-citizen customers. *Id.* 228:18-230:9.

49. Raiffeisen Bank later also stopped dealing with U.S. customers. *Id.* 233:9-15.

50. Gentges transferred his funds to another Swiss bank, Privatbank Von Graffenried, despite the fact that its fees were "quite a bit more expensive." *Id.* 233:16-234:4.

51. On several occasions between December 2013 and August 2016, Gentges's representative agreed in writing to extend the time within which the Secretary of the Treasury may assess an FBAR penalty against Gentges for calendar year 2007, ultimately extending the deadline for assessment until December 31, 2017. *See* Compl. ¶ 39; Answer ¶ 39.

52. On October 7, 2016, the IRS assessed penalties totaling \$903,853 against Gentges for his willful failure to comply with the FBAR filing requirements with respect to his UBS accounts for calendar year 2007. *See* Dolinger Decl. Ex. A (IRS Assessment documents); Compl. ¶¶ 40-41; Answer ¶¶ 40-41.

53. The IRS assessed a \$679,365 penalty relating to the 4959 Account and a \$224,488 penalty relating to the 4337 Account. *Id.*

54. The IRS examiner's report sets forth the bases for the agency's finding that Gentges's failure to disclose his UBS accounts was willful and its determination of the penalty amounts that the agency chose to assess. *See Dolinger Decl. Ex. I (FBAR Penalty Lead Sheet).*

Dated: April 30, 2020
New York, New York

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York

By: /s/ Samuel Dolinger
SAMUEL DOLINGER
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel.: (212) 637-2677
E-mail: samuel.dolinger@usdoj.gov